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NO. 95-415

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Respondent.

Petition for Writ of *Certiorari* to
the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

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Although the reasons which warrant the grant of a writ of *certiorari* are adequately stated in the petition, a brief reply is necessary to correct assertions contained in the Brief in Opposition filed by Columbus-America Discovery Group (CADG).

The assertions by CADG which require correction and

comment are grouped within three issues.

1. *The Law of the Case Issue.*

(a) The Petition asserts that the Fourth Circuit in CADG I, held that the Underwriters were the owners of the commercial shipment of gold carried by the S.S. CENTRAL AMERICA, and therefore, pursuant to the law of the case doctrine, the court is precluded from revisiting this decision. *United States v. County of San Diego*, 53 F.3d 965 (9th Cir. 1995). Respondent alleges that the law of the case doctrine does not apply because the Fourth Circuit never made a determination regarding ownership of the gold cargo. CADG cited the court's explanation in CADG II that such a determination was not made as evidence of this position. Although Petitioners admit that the Fourth Circuit denied the clear meaning of its words in CADG I, this denial is somewhat disingenuous in the context of this litigation.

The Fourth Circuit had many opportunities to reconsider the effect of its mandate in CADG I and repeatedly, refused to do so. Judge H. Emory Widener, Jr. dissented to the majority opinion in CADG I on the basis that the court was engaging in improper fact-finding. The majority was not persuaded by this argument and failed to even comment on Judge Widener's dissent.[1] CADG raised

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[1]Judge Widener surmised, (Pet. App. at 313-314a) that the CADG I majority determined that a finding of ownership was a necessary element of the trial court's finding of abandonment, a finding which was supported by the following discussion of the ownership evidence in the trial court's opinion:

> Insurance Companies rely solely upon the newspaper accounts for evidence that they

the fact-finding issue again in a Motion for Reconsideration and Suggestion for Re-hearing *In Banc* immediately following CADG I, and again the majority was unpersuaded by this argument. During the second trial of this matter, both the Underwriters[2] and the trial judge interpreted the Fourth

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> were insurers, the name of the insured, the amount of the insurance, the value of the shipment, whether a claim was made, what sum was supposedly paid, and to whom. They well must rely on the newspaper articles for they have no copies of any insurance policies, invoices for shipments, proof of loss, amounts paid or other records. *Without the newspaper accounts*, the evidence is totally insufficient to establish any claim of the insurance companies.

Pet. App. at 372a. (Emphasis added.)

The trial court determined in the same opinion that newspaper accounts recounting the events surrounding the sinking of the CENTRAL AMERICA would be admissible as ancient documents. Pet. App. at 377a. Consequently, it would not only be reasonable, but also necessary, for the majority in CADG I to presume that a finding of ownership had been made by the trial court in conjunction with the finding of abandonment.

[2]The Underwriters, in the second trial, prepared and submitted to the trial judge a stipulation which set forth the various percentages of claims that each Underwriter paid at the time of the loss. The Underwriters did so with the understanding that this stipulation would satisfy the first portion of the mandate in CADG I, and the trial judge would be left with determining the salvage award.

Circuit's opinion in CADG I as having resolved the ownership issue.[3]

The Fourth Circuit was given a third opportunity to clarify this alleged misunderstanding when CADG filed a Motion for Clarification following the second trial, requesting that the issue of ownership and the Fourth Circuit's mandate be clarified. Once again, the Fourth Circuit refused to clarify this mandate. Pet. App. at 398a. Therefore, considering the repeated allegations made to the majority by Judge Widener's dissent and CADG that a factual finding regarding ownership had been improperly made by the Fourth Circuit, it stretches the boundaries of reason to accept the Fourth Circuit's explanation in CADG II that the previous mandate had been misunderstood.[4]

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[3]Not only did the trial judge and the Underwriters believe the Fourth Circuit made such a determination, the published opinion contained a West Publishing Company headnote which reported such a determination was made. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 453 (4th Cir. 1992), *cert. denied*, 123 L. Ed. 2d 183, 113 S. Ct. 1625 (1993) (headnote 11).

[4]To add insult to injury, reliance upon the CADG I opinion not only cost the parties a huge amount of time and expense to litigate the issue of the salvage award before it was ripe, but the court also nonchalantly discarded the Underwriters' position that ownership was proven by stating in CADG II: "...it ought to be crystal clear that a claimant cannot prove his or her claim merely by filing a lawsuit." Pet. App. at 71a.

For the sake of accuracy, Petitioners did not file this lawsuit. The Fourth Circuit apparently ignored the laundry

(b) The Respondent's contention that the trial court made no findings of fact regarding ownership of the gold is contradicted by its own cross-appeal in CADG I. In CADG II, the Respondents and the Fourth Circuit asserted that the trial judge bifurcated the proceedings in a manner which caused the ownership issue not to be addressed in the first trial. If this was true, why did CADG appeal the trial court's ruling in the first trial on the grounds that ownership had not been proven? Pet. App. at 265. a CADG's own argument to the Fourth Circuit induced the court to believe, correctly, that a finding of ownership was at least a necessary implication of the trial court's finding of abandonment. Having raised this issue during the CADG I appeal, CADG was estopped from attempting to undo the results of this argument because the Fourth Circuit's opinion in CADG I was not favorable.

(c) Despite Respondent's assertions to the contrary, the Fourth Circuit in both CADG I and CADG II interpreted the trial court's ruling as establishing that the Underwriters made a *prima facie* case of ownership. If uncontradicted by admissible evidence, this clearly means that the Underwriters have proven their claims of ownership of the commercial shipment of gold. Considering that both CADG and the Underwriters have twice presented evidence on the ownership issue, unless the Fourth Circuit once again did not mean what it wrote, the record is complete and there is no further evidence to contradict the Underwriters' *prima facie* case, and the Underwriters are the lawful owners of the gold. Consequently, the issues presented in this petition are ripe for consideration.

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list of evidence the Underwriters presented in the first trial to prove ownership, a list which the court itself recounted in support of its affirmation of the ownership determination in CADG I. Pet. App. at 264-266a.

2. *The Title To The Salved Property Issue.*

The Underwriters' primary objection to the trial court's salvage award is that, due to the manner in which the award was made, under no circumstances will the owners of the property retain title to any portion of the property which was salved on its behalf. Respondent's arguments concerning the merits of the salvage award are self-serving, inappropriate and irrelevant.[5] The single issue regarding the salvage award raised in the petition is whether the trial court had the authority to divest the Underwriters of ownership of the *res* to ensure that the salvor received the highest market value possible for the property at judicial sale.

The Underwriters' argument in the petition does not contradict its earlier positions regarding the salvage award. Pursuant to traditional maritime salvage law, the owner of salved property is entitled to retain ownership of the property which has been lost.[6] Judicial discretion does not empower trial courts to circumvent the very foundations of salvage law, *i.e.*, to return distressed property to its owner, in order to ensure that the salvor realizes the maximum profit on the endeavor.

The Underwriters' previous request that the salvage award be made *in specie*, by defining the salvage award as a percentage of the *res*, is entirely consistent with the current position that they are entitled to title, possession and control over a percentage of the salved property. However, to establish the salvage award as a percentage of a judicial sale which has not taken place results in the complete divestiture of the Underwriters' ownership interests in the gold cargo.

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[5]See Respondent's Brief in Opposition pp. 14-17.

[6]See Petition for Writ of *Certiorari* pp. 36-38.

The Respondents, the trial court and the Fourth Circuit have cited no judicial authority for defining a salvage award in this manner. This award breaches the trial court's broad equitable powers to fashion a salvage award pursuant to the rules of admiralty.

This Honorable Court established in *Hobart v. Drogan*, 10 Pet. 108 (1836), that it was against sound policy and public convenience to encourage appeals of salvage awards, unless there has been some violation of just principles which ought to regulate the subject. *Id.* at 35-36. This dispute focuses on the violation of the salvage principle that the owner of salved property retains the ownership interest unless the salvage award cannot be paid.

Respondent's Brief in Opposition fails to address the issue of the Underwriters' ownership interest in the salved property. Respondent correctly asserts that an overwhelming number of salvage cases establish a salvage award as a percentage of the *res*. Those cases also judicially establish a value of the *res* at the time of the award by weighing the competing evidence of value and selecting a value based upon this competing evidence. The only unique factor in this case is that the salvor would like the court to ignore the current market for the gold cargo, and instead speculate as to the value of the gold in an inflated marketplace which the salvor may be able to create five years from now.

Both the Respondent and the trial court fail, however, to identify any authority for the court's refusal to place a value on the *res*, or authority to delay the judicial sale of the *res* for years to permit the development of an inflated market which does not exist and may never exist. The courts' assistance in this game of speculation is both unprecedented and improper pursuant to the Supplemental Rules of Admiralty.

3. *The Marketing Plan Issue.*

Respondent's Brief in Opposition artfully avoids the central problem involving the judicial sale of the gold. The trial court's designation of CADG, a party to this litigation, as the central authority for sale of the *res*, violates Supplemental Admiralty Rule E(9)(c) which precludes parties in interest from making a sale. It is clear from the trial court's marketing order that the Underwriters will not have an equal hand in marketing and selling the gold, but will merely have the power to voice objections to the trial court. Pet. App. at 213a. The Underwriters will not be equal partners in developing the marketing plan and will at no time have possession of, or even access to, the gold pursuant to this order.

Petitioners agreed at one point in the litigation that a unified marketing plan, devised and executed by an independent third party authority, would be an appropriate means of liquidating the *res*. It became clear that, despite the trial court's obligation to do so, the court intended to reject the third party plan and adopt the salvor as the central authority for sale of the gold. Petitioners objected to this deviation from the Supplemental Admiralty Rules and were forced to adopt a secondary position, requesting that the gold be divided *in specie* rather than be sold by the salvor alone.

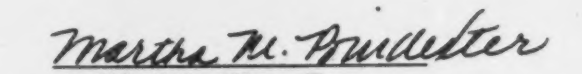
The trial court adopted the salvor's marketing plan because the Underwriters and the salvor refused to agree on a particular plan. Pet. App. 204-205a. Remarkably, the Underwriters' *refusal to deviate from* the Supplemental Admiralty Rules' requirement that the sale be conducted by a person not a party in interest resulted in the trial judge adopting the salvor's plan. Pet. App. 204-205a. The trial court offered no explanation for this obvious deviation from the rules, except that CADG had studied the markets and had

a far greater interest in the successful and proper marketing of the gold. Pet. App. 205a. Supplemental Admiralty Rule E(9)(c) does not provide for such an exception and the Petitioners have been unable to identify a single case where a trial judge has exercised such a broad degree of discretion.

CONCLUSION

In summary, Respondent's Brief in Opposition has failed to address Petitioners' primary legal arguments. This Court's supervisory powers must be invoked to determine if the Fourth Circuit's opinion in CADG II violates the law of the case doctrine. This Court must also determine the proper extent of a trial court's discretionary powers in the realm of salvage law, particularly regarding the rights of the owner of salved property and the authority of the trial judge to order that a judicial sale be conducted by a party to the litigation. For the foregoing reasons, as well as those which have been urged in the petition, a writ of *certiorari* should be granted.

Respectfully submitted,



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